



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OCT 25 2013

Andrei Cherny
P.O. Box 23838
Tempe, AZ 85285-3838

RE: MUR 6598

Dear Mr. Cherny:

On June 28, 2012, the Federal Election Commission notified you of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On October 21, 2013, based upon the information contained in the complaint, and information provided by you, the Commission decided to dismiss the complaint and close its file in this matter. Accordingly, the Commission closed its file in this matter on October 21, 2013.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Donald E. Campbell, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

General Counsel

BY: Jeff S. Jordan
Supervisory Attorney
Complaints Examination and
Legal Administration

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Andrei Cherny

MUR 6598

Andrei for Arizona and Seth Scott as treasurer

I. INTRODUCTION

This matter was generated by a complaint filed by Sharon Thomas on June 22, 2012, alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act") and Commission regulations by Andrei Cherny, Andrei for Arizona and Seth Scott as treasurer. It was scored as a low-rated matter under the Enforcement Priority System, a system by which the Commission uses formal scoring criteria as a basis to allocate its resources and decide which matters to pursue.

II. FACTUAL AND LEGAL ANALYSIS

I. Factual Background

In this matter, the Complainant, Sharon Thomas, alleges that Andrei Cherny¹ and his principal campaign committee, Andrei for Arizona and Seth Scott in his official capacity as treasurer (the "Committee"), failed to disclose expenditures for polling or research in violation of the Act and Commission regulations. Compl. at 1.

The Complainant cites to a May 30, 2012, article in the Arizona Capitol Times' Yellow Sheet Report entitled "His Lunch with Andrei," in which Cherny allegedly "attempted to use a December 2011 polling memo to convince another candidate not to run for Congress." *Id.* at 1, Ex.2. The Complaint alleges that "Cherny's campaign did not report any expenditure in polling

¹ Cherny was an unsuccessful candidate in the 2012 Democratic primary for Arizona's newly-redistricted 9th congressional district.

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or research” and “likewise . . . failed to indicate any debts to a polling firm or any other entity.”

Id. at 1.

In its Response, the Committee states that Cherny “personally commissioned an autodialer poll” in December 2011 to determine the “strength” of his potential opponents. Resp. at 1. The cost of the poll was “approximately \$3,000,” which “Cherny paid for . . . with his personal funds.” *Id.* at 2. The Committee contends that “the results of the Poll were Mr. Cherny’s ‘personal property,’” because Cherny “had commissioned the Poll with his personal funds” during the testing-the-waters phase of his campaign. *Id.* at 3. As such, the Committee maintains that the poll was “exempt under Section 100.75 from the definition of ‘contribution’ under [the Act],” and it was “not required to disclose the expenditures in the first quarterly report.” *Id.* Nevertheless, the Committee acknowledges that it “inadvertently failed to disclose Mr. Cherny’s personal expenditure for the Poll” on its original 2012 April Quarterly Report, and that it will file an amended report “to disclose fully the Poll and Mr. Cherny’s expenditure in connection therewith.”² *Id.* at 2.

II. Legal Analysis

Under the Act and Commission regulations, an individual becomes a candidate for federal office when he or she receives contributions or makes expenditures in excess of \$5,000. 2 U.S.C. § 431(2); 11 C.F.R. § 100.3. Both 11 C.F.R. §§ 100.72 and 100.131, which are commonly referred to as the “testing the waters” provisions, exclude from the definition of “contribution” and “expenditure” funds received and payments made solely to determine

² Although the Committee states that it “inadvertently” omitted to include the candidate’s contribution to the Committee in its first disclosure report filed with the Commission, it also states in its response that the expenditure made by the candidate was from “personal funds” and, therefore, not a contribution subject to reporting within the meaning of 11 C.F.R. §§ 100.75, 104.3(a)(2). Resp. at 3,4.

1 whether an individual should become a candidate.³ When filing the first report due after
2 registering as a political committee, a principal campaign committee must disclose all financial
3 activity that occurred before registration and before the individual became a candidate (including
4 any testing-the-waters activity), beginning with the first date of activity through the end of the
5 current reporting period. *See* 11 C.F.R. §§ 101.2(b), 101.3, 104.3(a) and (b). Committees are
6 required to report contributions from persons other than political committees, and, for an
7 authorized committee, contributions from the candidate. 2 U.S.C. § 434(b)(2)(A)-(B).

8 The Committee filed a Statement of Organization, and Cherny filed a Statement of
9 Candidacy, on February 7, 2012. The Committee filed its initial 2012 April Quarterly Report on
10 April 15, 2012, in which it did not disclose any expenditures for research or polling during the
11 “testing the waters” period. The Committee filed an Amended 2012 April Quarterly Report on
12 August 1, 2012, in which it reported an in-kind expenditure from the candidate dated January 1,
13 2012, for “research,” in the amount of \$2,500. This appears to be an expenditure for the polling
14 research alleged in the Complaint, and which the Response indicated would be reported in its
15 forthcoming amended 2012 April Quarterly Report.

16 Under the facts presented in this matter, it appears that Cherny had not received
17 contributions or made expenditures in excess of \$5,000 at the time the research poll was
18 commissioned and, therefore, there is no indication he had become a candidate for federal office.
19 Thus, the amount spent on polling during this period was not required to be reported, since the
20 contribution to the Committee occurred during the “testing of the waters” period. After filing its
21 Statement of Organization, however, the Committee was required to disclose all financial

³ “Testing the waters” activities include, but are not limited to, payments for polling, telephone calls, and travel. 11 C.F.R. §§ 100.72(a), 100.131(a). However, engaging in those activities alone, without meeting the statutory \$5,000 threshold, does not suffice to qualify an individual as a candidate under the Act. 2 U.S.C. § 431(2); 11 C.F.R. § 100.3.

1 activity that occurred before its registration. Therefore, the Committee should have reported the
2 research poll at issue as an in-kind contribution from the candidate in its initial 2012 April
3 Quarterly Report filed on April 15, 2012.

4 Based on the information supplied in the Complaint and Response, and in the disclosure
5 reports filed by the Committee, it appears that the alleged failure to report the research poll by
6 the candidate was subsequently corrected when the Committee reported the candidate's \$2,500
7 in-kind contribution for "research" in its amended 2012 April Quarterly Report, filed on August
8 1, 2012. Accordingly, the Commission determined that further enforcement action is
9 unnecessary, and exercised its prosecutorial discretion and dismissed this matter pursuant to
10 *Heckler v. Chaney*, 470 U.S. 821 (1985).

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